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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO DIVISION

In re: CATHODE RAY TUBE (CRT)
ANTITRUST LITIGATION

Case No. Master File No. 3:07-cv-05944-SC

MDL NO. 1917

This Document Relates to:

Best Buy Co., Inc., et al. v. Hitachi, Ltd., et al.,
No. 11-cv-05513

Best Buy Co., et al. v. Technicolor SA, et al.,
No. 13-cv-05264

Sears, Roebuck and Co. and Kmart Corp. v.
Technicolor SA, No. 3:13-cv-05262

Sears, Roebuck and Co. and Kmart Corp. v.
Chunghwa Picture Tubes, Ltd., No. 11-cv-
05514

**DEFENDANTS' REPLY IN SUPPORT OF
MOTION IN LIMINE # 8: TO EXCLUDE
EVIDENCE AND ARGUMENT
RELATING TO DAMAGES FROM
"SPILLOVER" OR "RIPPLE" EFFECTS
OF FOREIGN PRICE-FIXING
ACTIVITIES ON U.S. PRICES**

Redacted

Judge: Hon. Samuel Conti
Date: None Set
Ctrm: 1, 17th Floor

1 *Sharp Electronics Corp., et al. v. Hitachi Ltd.,*
2 *et al.*, No. 13-cv-1173

3 *Sharp Electronics Corp., et al. v. Koninklijke*
4 *Philips Elecs., N.V., et al.*, No. 13-cv-2776

5 *Siegel v. Hitachi, Ltd.*, No. 11-cv-05502

6 *Siegel v. Technicolor SA*, No. 13-cv-05261

7 *Target Corp. v. Chunghwa Picture Tubes,*
8 *Ltd.*, No. 11-cv-05514

9 *Target Corp. v. Technicolor SA*, No. 13-cv-
10 05686

11 *ViewSonic Corporation v. Chunghwa Picture*
12 *Tubes Ltd.*, No. 14-cv-2510

MEMORANDUM OF POINTS AND AUTHORITIES

Defendants' motion seeks to preclude Plaintiffs from shortcutting their burden at trial to satisfy the requirement of the FTAIA by making improper *arguments* that selling CRT component parts in a "global market" equates to a "direct" effect on the price of finished consumer goods sold in the United States. In opposition, Plaintiffs¹ make two flawed arguments: (1) the motion is inconsistent with the Ninth Circuit's recent decision in *United States v. Hsiung* and (2) Defendants were aware or had knowledge that price-fixed CRT components would eventually be incorporated into finished goods and sold in the United States. *See* DAP Opp'n. at 1-3. The first argument is wrong. This motion is fully consistent with and supported by *Hsiung*. The second argument is irrelevant because awareness or knowledge has no bearing on the "directness" of effect.

Plaintiffs also exaggerate the scope of this motion. *See* DAP Opp'n at 2, 4. This motion does not seek to preclude evidence or argument as to CRT components directly imported into the United States. Defendants make no argument in this motion *in limine* based on the FTAIA's "import commerce" exemption, which the Ninth Circuit confirmed applies only to direct imports of the price-fixed component. *United States v. Hsiung*, -- F.3d. --, 2015 WL 400550, at *13-14 & n.8 (9th Cir. Jan. 30, 2015) (considering only evidence of direct imports of price-fixed LCD panels, not finished LCD products, under the import commerce exception and declining to apply the exception to any other type of conduct). Nor does this motion seek to bar Plaintiffs from introducing concrete and admissible evidence of how and when the conspiracy allegedly affected prices of finished products purchased by the Plaintiffs in the United States. On the contrary, if, as Plaintiffs claim, they have an "abundance of evidence" to show that the conspiracy had a "direct" effect under the FTAIA, *see* DPP Opp'n at 3, they must present such evidence at trial. In fact, the

¹ Direct Action Plaintiffs (DAPs), Plaintiffs Sharp Electronics Corporation and Sharp Electronics Manufacturing Company of America, Inc. (collectively "Sharp"), and the Indirect Purchaser Plaintiffs (IPPs) each filed oppositions to Defendants' Joint Motion in Limine No. 8. *See* ECF Nos. 3658, 3678, 3694. In this Reply, the Defendants jointly respond to the DAP and Sharp oppositions. The Toshiba Defendants will be separately responding to the IPP opposition. Each undersigned Defendant joins this Reply only as to the cases in which it remains active.

1 purpose of this motion is to ensure that Plaintiffs have to meet their FTAIA burden with concrete
2 evidence, not with improper argument about inter-connected global markets.

3 Plaintiffs do not and cannot dispute that they have the statutory burden of actually proving
4 that Defendants' conduct had a "direct effect" under the FTAIA's "domestic effects" exception.
5 *See United States v. LSL Biotechnologies*, 379 F.3d 672, 678 (9th Cir. 2004); *Hsiung*, 2015 WL
6 400550 at *16-17. It is also well established that the FTAIA's domestic effects test cannot be
7 satisfied when "action in a foreign country filters through many layers and finally causes a few
8 ripples in the United States." *Id.* at * 18 (quoting *Minn-Chem, Inc. v. Agrium, Inc.*, 683 F.3d 845,
9 860 (7th Cir. 2012)); *see also* Defs. Motion in *Limine* No. 8 at 2-3. This motion is addressed to
10 that crucial distinction established by Ninth Circuit law: Plaintiffs should not be allowed to
11 shortcut their burden to prove that the alleged conspiracy on CRT components had a "direct"
12 effect on prices of finished products Plaintiffs purchased in the American market by arguing the
13 FTAIA is satisfied by the *rippling* effects of agreements to fix prices abroad.

14 ***First, Ninth Circuit law precludes Plaintiffs from shortcutting their burden under the***
15 **FTAIA.** In *Hsiung*, the Ninth Circuit reaffirmed the standard in *LSL Biotechnologies*, that
16 conduct has a "direct" effect under the FTAIA only "'if it follows as an immediate consequence of
17 the defendant[s'] activity'" and does not "'depend[] on . . . uncertain intervening developments.'" *Hsiung*
18 2015 WL 400550 at *17 (quoting *LSL Biotechnologies*, 379 F.3d at 680-81). *Hsiung* then
19 examined whether the government's evidence had been sufficient to satisfy this standard, and held
20 that, "[l]ooking at the conspiracy as a whole," a rational jury "could have found" that the
21 conspiracy had a direct effect on U.S. commerce. *Id.* at *16-17.

22 The standard that *Hsiung* applied to the DOJ's criminal enforcement action is different
23 than the standard applicable to civil suits for damages. In this case, unlike in the DOJ's case, it is
24 not enough to prove that *some* transactions satisfy the FTAIA, such as direct imports of allegedly
25 price-fixed CRTs. Instead, Plaintiffs' damages claims are barred unless they prove that direct
26 effects gave rise to *all* of their claims for damages. *See F. Hoffmann-La Roche Ltd. v. Empagran*
27 *S.A.*, 542 U.S. 155, 174 (2004) (holding that the "gives rise to" prong of the exception requires
28 that the necessary effect on U.S. commerce gives rise to "the plaintiff's claim" or "the claim at

issue”); *see also Motorola Mobility LLC v. AU Optronics Corp.*, -- F.3d --, 2015 WL 137907, at *1-3, *10, *12 (7th Cir. Jan. 12, 2015) (holding that even though Motorola “has a solid claim” for LCD panels imported into the United States, its claims based on U.S. purchases of finished products from its foreign subsidiaries that bought LCD panels abroad were barred by the FTAIA); *In re Static Random Access Memory (SRAM) Antitrust Litig.*, No. 07-md-01819, 2010 WL 5477313, at *4 (N.D. Cal. Dec. 31, 2010) (rejecting plaintiffs’ argument that the FTAIA should be evaluated by looking to “the complaint . . . as a whole” because to do so would make FTAIA-barred claims “justiciable simply by being combined under the rubric of a single claim,” and holding that “if necessary, a portion of the claims may be dismissed from the lawsuit”).

The *Hsiung* decision is not surprising when considering “the conspiracy as a whole.” One of the first pieces of evidence cited by the Ninth Circuit was that the foreign cartel meetings resulted in agreements on prices that were applied to LCD panels the conspirators “imported directly into the United States.” *Hsiung*, 2015 WL 400550 at *17. Directly importing price-fixed components would have a direct effect on U.S. commerce, so it is no wonder the Ninth Circuit found the domestic injury exception was satisfied based on these imports. But Defendants’ motion *in limine* is not directed at direct imports of the allegedly price-fixed components here, CRTs, so *Hsiung* is inapposite.

In addition to the direct imports, the *Hsiung* court also discussed evidence about how panels were incorporated into finished products, how panels go from plants into a product, and how based on specific data price-fixed panels ended up in finished consumer goods in the United States. *Id.* at *16-17. The *Hsiung* court did not hold that generalized or theoretical expert opinions about interconnected global markets were sufficient to satisfy the FTAIA’s direct effects test. *Id.* at *17. To the contrary, *Hsiung* specifically acknowledged that claims would fail as a matter of law where the effect on U.S. commerce was “insulated by multiple disconnected layers of transactions.” *Id.* It then held that the DOJ’s evidence was sufficient to establish some effect on domestic commerce not insulated by such multiple layers of transactions when considering “the conspiracy as a whole.” *Id.*

1 The distinction between DOJ enforcement actions and private suits for damages
 2 demonstrates why the DOJ's criminal action could be supported by "[l]ooking at the conspiracy as
 3 a whole," while the damages claims brought by Plaintiffs cannot. The DOJ itself expressly
 4 acknowledged this distinction in amicus briefs it filed with the Seventh Circuit in *Motorola*
 5 *Mobility*. 2015 WL 137907, at *10-11 (noting that even though the DOJ successfully prosecuted
 6 AUO for the same conduct at issue in *Motorola Mobility*, the DOJ "does not suggest that the
 7 defendants' conduct gave rise to an antitrust damages remedy for Motorola"). So did the Seventh
 8 Circuit, which noted that the DOJ was capable of "addressing the concerns raised by [foreign
 9 nations] about an unduly expansive application of U.S. law that they claim would undermine
 10 principles of international comity." *Id.* (internal quotation marks and citation omitted). In
 11 contrast, "comity considerations with private plaintiffs are quite different. Private plaintiffs . . .
 12 often are unwilling to exercise the degree of self-restraint and consideration of foreign
 13 governmental sensibilities exercised by the U.S. Government." *Id.* (internal quotation marks and
 14 citation omitted).²

15 It is in part due to the different posture of actions brought by the DOJ and private plaintiffs
 16 that the DOJ "was successful in its criminal prosecution against AU Optronics for conduct that
 17 Motorola seeks, improperly we believe, to recover damages for in [its] case." *Motorola Mobility*,
 18 2015 WL 137907, at *10. Unlike the DOJ, Plaintiffs here must prove that all of their claims
 19 satisfy the FTAIA by establishing that their damages were proximately caused by direct,
 20 substantial, and reasonably foreseeable domestic effects of Defendants' foreign CRT sales. They
 21 cannot meet this burden through evidence of "ripple[]" effects or on the basis of expert testimony

22
 23 ² The Seventh Circuit was right to be concerned about private plaintiffs ignoring the
 24 considerations of foreign nations, as demonstrated by Best Buy's belief that the FTAIA imposes
 25 no limits whatsoever on its state law claims. As explained in more detail in Defendants' Motion
 26 for Partial Summary Judgment on Plaintiffs' Indirect Purchaser Claims Based on Foreign Sales
 27 (ECF No. 3006), which is currently pending before the Court, this argument has been squarely
 28 rejected by every other court to consider the issue. *See, e.g., In re SRAM*, 2010 WL 5477313, at
 *4 (N.D. Cal. Dec. 31, 2010) (rejecting this argument as "unpersuasive"); *In re Intel Corp.*
Microprocessor Antitrust Litig. 476 F. Supp. 2d 452, 457 (D. Del. 2007) (ruling that the FTAIA
 applied to claims under state antitrust law because Congress's intent "would be subverted if state
 antitrust laws were interpreted to reach conduct which the federal law could not").

1 that such effects were purportedly transmitted through “multiple disconnected layers of
2 transactions.” *Hsiung*, 2015 WL 400550, at *17-18. Defendants’ motion *in limine* should be
3 granted to preclude such evidence and argument from trial.

4 **Second, Plaintiffs’ argument that Defendants were aware that their products may end**
5 **up in the United States is irrelevant.** The relevant standard to satisfy the “domestic effects”
6 prong of the FTAIA is whether a defendant’s conduct had “a direct, substantial, and reasonably
7 foreseeable effect” on United States commerce. Plaintiffs’ opposition confuses the “reasonably
8 foreseeable” requirement with the “directness” requirement. While subjective awareness of the
9 requisite effect may be relevant to foreseeability, it has no relevance as to directness under the
10 FTAIA.³ By conflating these requirements, Plaintiffs’ arguments would absolve them of their
11 burden to prove directness, and render null that statutory requirement. *See Corley v. United*
12 *States*, 556 U.S. 303, 314 (2009) (“a statute should be construed so that effect is given to all its
13 provisions, so that no part will be inoperative or superfluous”) (internal quotation marks and
14 citation omitted).

15 **Finally, Plaintiffs’ citation to abstract testimony from their experts in their**
16 **oppositions highlights the need for this motion to be granted.** Plaintiffs’ opposition quotes
17 their expert, Dr. Elzinga, opining at a general level that “a cartel would function more effectively
18 ... on a global basis” and that participants in this alleged cartel “recognized the interconnections
19 between the various regions of the world in which CRTs were sold.” *See* DAP Opp’n at 4-5.
20 Sharp’s expert, Dr. Hausman (quoted in Sharp’s Opposition) makes the same type of
21 generalization: “[I]f prices in the rest of the world increase . . . the amount by which prices in
22 North America can be increased . . . also increases.” *See* Sharp Opp’n at 3. Regardless of
23 whether these sorts of arguments are supported by economic theory, they do not satisfy the law.
24 Plaintiffs cannot rely on such theoretical connections between markets to satisfy their burden of
25

26 _____
27 ³ As the language of the FTAIA makes clear, the relevant inquiry under the “foreseeability” prong
28 is whether the effect on domestic commerce was foreseeable, not whether entry of the product into
the U.S. market was foreseeable. *See* 15 U.S.C. § 6a.

1 proving that the alleged agreements to fix prices in Asia had a “direct” effect on the United States
2 market.

3 Plaintiffs claim that Dr. Elzinga goes on to cite evidence that the cartel members were
4 aware that their anticompetitive agreement directly affected CRT prices in the United States. DAP
5 Opp’n at 4. But, in fact, in the portions of the expert report cited by Plaintiffs, Dr. Elzinga points
6 [REDACTED] – the very type of “spillover”
7 or “ripple” effect that courts have held to be insufficient to meet the FTAIA bar. For example, Dr.
8 Elzinga [REDACTED]
9 [REDACTED] See
10 Declaration of Samuel Randall (“Randall Decl.”) Ex. 1 (Rebuttal Expert Report of Dr. Kenneth G.
11 Elzinga, September 26, 2014 at 80, ECF No. 3667-5 (emphasis added). In another example, Dr.
12 Elzinga cites [REDACTED]
13 [REDACTED] (emphasis added).

14 Congress enacted the FTAIA to respond to concerns about the broad reach of the U.S.
15 antitrust law and to limit such law to conduct that had, among other things, a direct and substantial
16 impact on the United States. *Hsiung*, 2015 WL 400550 at *9. General testimony about the
17 interconnectedness of global markets and that cartels work more effectively on a global basis
18 could apply to almost any product market today. Allowing such generalized evidence to satisfy
19 the FTAIA requirements would directly contravene the congressionally mandated limits on U.S.
20 antitrust law imposed by the FTAIA, and therefore should not be permitted.

21 * * *

22 Rather than put forth concrete evidence of a “direct” and “substantial” effect, Plaintiffs
23 have indicated that they intend to put forth generalized testimony that, as a matter of abstract
24 economic theory, price increases of CRTs sold into a globally interconnected market could have
25 impacted prices of finished consumer goods sold in America. Such generalizations are insufficient
26 under the law to establish a “direct” effect under the FTAIA. As such, the Court should grant
27 Defendants’ motion *in limine* to preclude such improper arguments.
28

1 Dated: March 6, 2015

Respectfully submitted,

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24 Pursuant to Local Rule 5-1(i)(3), the filer attests that concurrence in the filing of this
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